

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL P. JOSLYN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 14-cv-05277 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 16, 17, 18).

After considering and reviewing the record, the Court concludes that the ALJ did not err in relying on early opinions from plaintiff's treating physician as plaintiff has not demonstrated that his conditions worsened over time and the ALJ appropriately

1 concluded that the treating physician was in the best position to provide an opinion
2 regarding plaintiff's limitations. Similarly, plaintiff's argument that reliance on the
3 opinions from a state agency physician was improper because the non-examining state
4 agency physician did not review later records is not persuasive as plaintiff has not
5 demonstrated that there was any significant worsening of his limitations from his
6 impairments over time. The Court also concludes that the ALJ did not commit harmful
7 error in his evaluation of plaintiff's mental impairments as the ALJ appropriately found
8 that plaintiff had not demonstrated that any mental impairment that lasted for a duration
9 of twelve months. Regarding the ALJ's assessment of plaintiff's credibility, it was
10 supported by inconsistent statements made by plaintiff, as well as by the ALJ's thorough
11 discussion of the medical evidence and the ALJ's finding that the objective medical
12 evidence did not support plaintiff's allegations of disabling limitations.

14 Therefore, this matter is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

15 BACKGROUND

16 Plaintiff, DANIEL P. JOSLYN, was born in 1965 and was 46 years old on the
17 amended alleged date of disability onset of September 27, 2011 (*see* AR. 44, 165-66,
18 167-72). Plaintiff has an eleventh grade education (AR. 45). Plaintiff has work
19 experience as a construction worker (AR. 62) and briefly as a crew member on a fishing
20 troller (AR. 197-98).

21 According to the ALJ, plaintiff has at least the severe impairments of
22 "Degenerative disc disease; [and] bilateral carpal tunnel syndrome status post bilateral
23 carpal tunnel release (20 C.F.R. §§ 404.1520(c) and 416.920(c))" (AR. 24).

1 At the time of the hearing, plaintiff was living in a mobile home with his dad and
2 girlfriend (AR. 46-47).

3 PROCEDURAL HISTORY

4 Plaintiff's application for disability insurance ("DIB") benefits¹ pursuant to 42
5 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to 42
6 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
7 following reconsideration (*see* AR. 70-77, 78-85, 88-94, 95-103). Plaintiff's requested
8 hearing was held before Administrative Law Judge Scott R. Morris ("the ALJ") on March
9 11, 2013 (*see* AR. 39-67). On March 29, 2013, the ALJ issued a written decision in
10 which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security
11 Act (*see* AR. 18-38).

13 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or
14 not the ALJ properly evaluated the medical evidence; (2) Whether or not the ALJ
15 properly evaluated plaintiff's testimony; (3) Whether or not the ALJ properly assessed
16 plaintiff's residual functional capacity; and (4) Whether or not the ALJ erred by basing
17 his step five finding on a residual functional capacity assessment that did not include all
18 of plaintiff's limitations (*see* Dkt. 16, p. 1).

19 STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
21 denial of social security benefits if the ALJ's findings are based on legal error or not
22

23 ¹ Plaintiff effectively withdrew his DIB application when he amended his alleged
24 disability onset date at his administrative hearing (*see* Opening Brief, Dkt. 16, p. 2, n.2).

1 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 2 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 3 1999)).

4 DISCUSSION

5 (1) **Whether or not the ALJ properly evaluated the medical evidence.**

6 a. Non-examining state agency physician, Dr. Norman Staley, M.D.

7 Plaintiff first presents arguments regarding the ALJ's reliance in part on the
 8 opinion of non-examining state agency physician Dr. Norman Staley, M.D., whose
 9 opinion was given significant weight by the ALJ (AR. 29).

10 According to Social Security Ruling 96-6p, state agency medical consultants,
 11 while not examining doctors, "are highly qualified physicians and psychologists who are
 12 experts in the evaluation of the medical issues in disability claims under the Act." Social
 13 Security Ruling ("SSR") 96-6p, 1996 LEXIS 3 at *4. Therefore, regarding state agency
 14 medical consultants, the ALJ is "required to consider as opinion evidence" their findings,
 15 and also is "required to explain in his decision the weight given to such opinions."
 16 *Sawyer v. Astrue*, 303 Fed. Appx. 453, *455, 2008 U.S. App. LEXIS 27247 at **2-**3
 17 (9th Cir. 2008) (*citing* 20 C.F.R. § 416.927(f)(2)(i)-(ii); SSR 96-6p, 1996 SSR LEXIS 3,
 18 *5) (memorandum opinion) (unpublished opinion). The ALJ did that here.

19 Plaintiff contends that the ALJ erred by failing to acknowledge that non-
 20 examining state agency physician Dr. Staley did not review any evidence beyond
 21 February 2012 (*see* Opening Brief, Dkt. No. 16, p. 9). However, although plaintiff argues
 22 in a conclusory manner that plaintiff's "carpal tunnel syndrome and back pain worsened
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1 over time,” plaintiff does not cite any specific evidence that demonstrates this (*see id.*).
2 Although this argument is preceded by a general six page recitation of the medical
3 record, plaintiff makes no attempt to connect any particular aspect of the record to his
4 argument, and furthermore, the majority of the recitation of the medical evidence covers
5 a period preceding February, 2012 (*see id.*, pp. 3-9). This is insufficient. It is not the job
6 of the Court to pour through a general recitation of facts from plaintiff in an attempt to
7 interpret what aspects of the record plaintiff considers supportive of his argument. *See*
8 *Maldonado v. Moralex*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009) (“Arguments made in
9 passing and inadequately briefed are waived”) (*citing Halicki Films, L.L.C. v. Sanderson*
10 *Sales & Mktg.*, 547 F.3d 1213, 1229-30 (9th Cir. 2008)); *see also Alder v. Wal-Mart*
11 *Stores, Inc.*, 144 F.3d 664, 669 (10th Cir. 1998) (“Arguments inadequately briefed in the
12 opening brief are waived”) (*citing Fed. R. App. P. 28*) (other citations omitted).
13 Furthermore, a review of the medical evidence noted by plaintiff regarding the time
14 period after February, 2012 does not demonstrate that plaintiff’s impairments worsened
15 over time and do not demonstrate that any of the ALJ’s findings are not based on
16 substantial evidence in the record as a whole, as discussed further below, *see infra*,
17 section 1.b. Based on a review of the record, the Court finds persuasive defendant’s
18 argument that plaintiff “simply offers a different interpretation of the evidence
19 considered by the ALJ” (Dkt. 17, p. 12). As noted by defendant, according to the Ninth
20 Circuit, a court should uphold an ALJ’s decision when the evidence is susceptible to
21 more than one rational interpretation (*see id. (citing Tommasetti v. Astrue*, 533 F.3d 1035,
22 1040 (9th Cir. 2008)). It is not the job of the court to reweigh the evidence: If the
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1 evidence “is susceptible to more than one rational interpretation,” including one that
2 supports the decision of the Commissioner, the Commissioner's conclusion “must be
3 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citing *Morgan v.*
4 *Comm’r Soc. Sec.*, 169 F.3d 595, 601 (9th Cir. 1999)).

5 Based on the record as a whole, and for the reasons stated, the Court concludes
6 that plaintiff has not demonstrated that the ALJ erred by not explicitly discussing the fact
7 that Dr. Staley did not review any records beyond February, 2012. Even if there was such
8 an error, it was harmless and did not affect the ultimate disability determination.

9
10 Plaintiff also contends that the ALJ erred by giving significant weight to the
11 opinion of Dr. Staley because Dr. Staley opined that plaintiff did not suffer from
12 manipulative limitations (*see* Opening Brief, Dkt. No. 16, p. 9). However, even if the
13 ALJ did err with respect to this aspect of Dr. Staley’s opinion, which the Court does not
14 so conclude, any error is harmless, as the ALJ clearly and explicitly explained why he
15 disregarded this aspect of Dr. Staley’s opinion and continued his reasoning regarding his
16 own determination regarding plaintiff’s residual functional capacity (“RFC”) as follows:

17 Although the claimant has some limitations due to his carpal tunnel
18 syndrome, he still maintains the ability to perform most household
19 chores. He can pull weeds. He can open jars. He can open cans. He
20 reported he still maintains an active lifestyle preparing meals, taking care
21 of his personal needs, feeding animals and going grocery shopping. The
22 claimant’s self-described activities are consistent with the restrictions in
23 the [RFC] outlined above. Dr. Staley’s opinion is also consistent with
24 Dr. Lang’s opinion regarding the claimant’s abilities.

(AR. 29).

1 Therefore, the Court concludes that the ALJ adequately explained why he rejected
2 this aspect of Dr. Staley’s opinion regarding a lack of manipulative limitations, and also
3 supported his RFC finding regarding plaintiff’s manipulative limitations with substantial
4 evidence in the record (*see id.*). Therefore, any error is harmless error.

5 The Ninth Circuit has “recognized that harmless error principles apply in the
6 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
7 (*citing Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
8 Cir. 2006) (collecting cases)). The Ninth Circuit noted that “in each case we look at the
9 record as a whole to determine [if] the error alters the outcome of the case.” *Id.* The court
10 also noted that the Ninth Circuit has “adhered to the general principle that an ALJ’s error
11 is harmless where it is ‘inconsequential to the ultimate nondisability determination.’” *Id.*
12 (*quoting Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
13 (other citations omitted). The court noted the necessity to follow the rule that courts must
14 review cases “‘without regard to errors’ that do not affect the parties’ ‘substantial
15 rights.’” *Id.* at 1118 (*quoting Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009) (*quoting* 28
16 U.S.C. § 2111) (codification of the harmless error rule)).

17 Here, although Dr. Staley’s opinion regarding plaintiff’s lack of manipulative
18 limitations may not have been supported by substantial evidence in the record, it is clear
19 that the ALJ did not credit this opinion from Dr. Staley, as the ALJ found that plaintiff
20 did have manipulative limitations (*see* AR. 25). The ALJ found that plaintiff only could
21 “occasionally finger and feel when using his left upper extremity and frequently finger
22 and feel when using his right upper extremity” (*see id.*). Therefore, any error in Dr.
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1 Staley's opinion regarding manipulative limitations did not affect the ALJ's RFC, as the
2 ALJ determined that plaintiff did suffer from manipulative limitations, and noted Dr.
3 Staley's error in that respect. The ALJ also explained how the other aspects of Dr.
4 Staley's opinion were consistent with the opinion of treating physician, Dr. Lang, and
5 how they were supported by the medical record and by claimant's statements. The Court
6 concludes that there is no error, but even if there was any error in relying in part on Dr.
7 Staley's opinion, any error is harmless and did not affect the ultimate disability
8 determination. *See Molina, supra*, 674 F.3d at 1115.
9

10 b. Treating physician, Dr. Robert G.R. Lang, M.D.

11 Plaintiff also argues that the ALJ erred by giving significant weight to an opinion
12 from Dr. Lang that pre-dated plaintiff's alleged disability onset date; however, the
13 doctor's opinion still is relevant as plaintiff has not demonstrated how the record
14 indicates significant worsening of plaintiff's condition after this point in time.

15 For example, regarding plaintiff's back impairment, approximately a month after
16 plaintiff's amended alleged date of disability onset of September 27, 2011, plaintiff
17 received a second MRI which indicated, as noted by plaintiff:

18 (1) at L2-L3, a small caudal left foraminal protrusion without neural
19 compress, *unchanged*; (2) at L3-L4, a small left foraminal protrusion
20 with underlying high intensity zone, causing mild effacement at the
21 exiting left L3 nerve root, *unchanged*; (3) at L4-L5, left foraminal
22 herniation and associated osseous ridging with moderate left foraminal
stenosis, *unchanged*; and (4) at L5-S1, mild bilateral facet arthropathy
and mild annular bulging, *unchanged*; and mild bilateral foraminal
stenosis, *unchanged*.

23 (Dkt. 16, p. 6 (*citing* AR. 371) (emphases added)).
24

1 Similarly, as cited by plaintiff, a January, 2012 lumbar spine MRI indicated that
2 “accounting for differences in technique, overall these changes are very similar to the
3 MRI of October, 2011, and no significant progression of disease is evident” (Dkt. 16, p. 7
4 (*citing* AR. 375)). Therefore, plaintiff has not demonstrated that his back impairment
5 worsened over time, negating the earlier opinion of Dr. Lang.

6 Regarding plaintiff’s carpal tunnel syndrome, as noted by plaintiff, in July, 2012,
7 Dr. Kirk D. Danielson, M.D. indicated that an electrodiagnostic study on plaintiff
8 “showed evidence of moderate bilateral median neuropathy at the wrists (carpal tunnel
9 syndrome) affecting both sensory and motor components, and he noted that the right side
10 was *mildly improved* compared to the prior March 2011 study, while the left was
11 *relatively similar*” (*id.*, pp. 7-8 (*citing* AR. 423-24) (emphases added)). Also as noted by
12 plaintiff, in March, 2013, among other notations, Dr. Lang noted that plaintiff “had
13 *improved sensation* in the extremities” (*id.*, p. 9 (*citing* AR. 523, 525)) (emphasis
14 added)).
15

16 For the reasons stated and based on the record as a whole, the Court concludes that
17 plaintiff has not demonstrated error in the ALJ’s reliance on a September 9, 2011 opinion
18 from Dr. Lang that plaintiff could perform light work with his argument that “medical
19 evidence after [September 9, 2011] shows that [plaintiff’s] carpal tunnel syndrome and
20 back pain both worsened subsequent to that date” (*see id.*, p. 10 (*citing* AR. 29-30, 292,
21 319)).
22

23 Plaintiff also argues that the ALJ erred by relying on Dr. Lang’s January 2012
24 opinion that “[if] the patient was able to obtain his license again it is likely that he would

1 be able to return to productivity” because the opinion “does not prove that [plaintiff]
2 could perform *competitive work on a full-time basis*” (*see id.*, p. 10 (*citing* AR. 29-30,
3 292, 319)). Although it is true that this opinion from Dr. Lang does not prove that
4 plaintiff was capable of competitive work, this fact does not prevent the ALJ from relying
5 in part on this opinion from the treating physician. Plaintiff also contends that the ALJ
6 erred by relying on this latter opinion from Dr. Lang because “more recent medical
7 evidence, including much evidence from Dr. Lang [] shows that [plaintiff’s] carpal tunnel
8 syndrome and back pain both continued to worsen over time” (*id.*). As discussed above,
9 the medical evidence cited by plaintiff does not demonstrate that plaintiff’s conditions
10 worsened over time.
11

12 Although plaintiff also directs the Court to a particular portion of the record in
13 support of this argument, in that “Dr. Lang’s most recent opinion [indicated] that
14 [plaintiff] had moderate to severe carpal tunnel syndrome of the right hand, which
15 required a second carpal tunnel surgery,” (*id.* at p. 11 (*citing* AR. 529)), as cited by
16 plaintiff earlier in his brief, on “March 10, 2011, [Dr.] Mohammad A. Saeed, M.D.,
17 found that an electrodiagnostic evaluation of [plaintiff] supported findings compatible
18 with bilateral carpal tunnel syndrome, right more than the left, appearing moderately
19 severe to severe on the right and moderately severe on the left” (*id.* at p. 4 (*citing* AR.
20 298). Again, plaintiff has not demonstrated that his impairments significantly worsened
21 over time, negating the earlier opinions from Dr. Lang relied on by the ALJ.
22

23 Based on the reasons stated and on the record as a whole, the Court concludes that
24 plaintiff has not demonstrated that the ALJ erred in relying on the specified opinions of

1 Dr. Lang, plaintiff's treating physician. Instead, the Court concludes that the ALJ's
2 determination to give Dr. Lang's opinion significant weight, "because he is the claimant's
3 treating provider and is best suited to opine on how the claimant's impairments impact
4 his ability to perform work activities," and the ALJ's finding that Dr. Lang's "opinion is
5 also consistent with the other objective findings in the claimant's file and the claimant's
6 own statements regarding his abilities" are supported by substantial evidence in the
7 record as a whole (*see* AR. 30). The Court finds no harmful legal error.

8 c. Dr. Kimberly Wheeler, Ph.D., examining psychological doctor

9 Although plaintiff implies that the ALJ failed to evaluate the opinion of Dr.
10 Wheeler properly and argues that "an ALJ is required to evaluate 'every medical
11 opinion,'" the ALJ did evaluate the opinion of Dr. Wheeler (*see* Dkt. 16, p. 11 (citation
12 and footnote omitted)).

13 The ALJ included the following discussion in his written opinion:

14 Dr. Kimberly Wheeler, Ph.D. performed a psychological evaluation of
15 the claimant in September 2012 and diagnosed him with an adjustment
16 disorder because of his emotional difficulties dealing with his inability to
17 perform physical activities (internal citation to Exhibit 29F/2). Dr.
18 Wheeler even noted that addressing the claimant's condition as a
19 disorder "is somewhat of a stretch, but is the best way to capture his
20 diminished self-esteem in the absence of employment and full physical
21 integrity" (internal citation to 29F/2). She identified no restrictions in the
22 claimant's ability to perform work-related activities due to his
23 adjustment disorder (internal citation to 29F/2). She also noted the
24 claimant would not be impaired for any length of time due to his
impairment (internal citation to 29F/4). Furthermore, the claimant's
alleged mental impairment is not expected to last for more than 12
months. Medical records from January 2013 indicate the claimant had no
mental deficits. He was oriented on all spheres (internal citation to
34F/23). He had normal insight and judgment (internal citation to
34F/23). He had inappropriate mood and affect (internal citation to

1 34F/23). Because the claimant was only diagnosed with an adjustment
2 disorder in September 2012 and he showed no impairment in his mental
3 functioning and later medical records, his alleged mental impairment is
4 unlikely to meet the durational requirement necessary to be considered a
severe impairment. There is also no indication that his alleged
adjustment disorder would more than minimally limit his ability to
perform any work-related activities.

5 (AR. 24).

6 Although plaintiff complains that the ALJ erred when reviewing the opinion of Dr.
7 Wheeler, based on a review of the relevant record, the Court concludes that the ALJ's
8 findings with respect to the opinion of Dr. Wheeler are supported by substantial evidence
9 in the record. As noted by the ALJ, Dr. Wheeler opined that plaintiff's "emotional
10 sequelae" had to do with diminished self worth, but "[d]ressing it up to the level of
11 disorder is somewhat of a stretch" (*see* AR. 432). Although Dr. Wheeler opined that
12 plaintiff suffered from some moderate limitations (*see* AR. 433), she also opined that his
13 thought process and content were within normal limits; his orientation was within normal
14 limits; his perception was within normal limits; his fund of knowledge was within normal
15 limits; his concentration was within normal limits; his abstract thought ability was within
16 normal limits; his insight and judgment were within normal limits; and he remembered
17 three out of three objects immediately and two out of three with a delay and with the third
18 object even being recognized among the presence of distractors (*see* AR. 434-35).
19 Therefore, the Court concludes that the ALJ's finding that Dr. Wheeler "identified no
20 restrictions in the claimant's ability to perform work-related activities due to his
21 adjustment disorder" is based on substantial evidence in the record as a whole. In
22 addition, importantly as noted by the ALJ, Dr. Wheeler opined that the expected duration
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1 of time that plaintiff would suffer from any opined limitations would be “0 months” (*see*
2 AR. 484). Therefore, the Court concludes that the ALJ’s finding that Dr. Wheeler “also
3 noted the claimant would not be impaired for any length of time due to his impairment” is
4 a finding based on substantial evidence in the record. This opinion from Dr. Wheeler also
5 supports the finding by the ALJ that plaintiff’s impairment would not last the minimum
6 duration of twelve months.

7
8 For the reason stated and based on the record as a whole, the Court concludes that
9 the ALJ did not err by failing to include any limitations from a mental impairment into
10 plaintiff’s RFC. The Court concludes that the ALJ did not err in his evaluation of the
11 opinion of Dr. Wheeler.

12 As noted by the ALJ, in January, 2013 -- about four months after the assessment
13 from Dr. Wheeler -- plaintiff had intact memory, was oriented to time place person and
14 situation, had normal insight, exhibited normal judgment, and demonstrated an
15 appropriate mood and affect (*see* AR. 485). This information, too, supports the finding by
16 the ALJ that any mental impairment of plaintiff was not severe and also did not last the
17 minimum duration of 12 months. Although plaintiff argues that the ALJ erred by failing
18 to conclude that plaintiff suffered from a severe mental impairment, for the reason stated
19 and based on the record, the Court concludes that this finding by the ALJ is supported by
20 substantial evidence in the record. The Court notes that plaintiff bears the burden to
21 establish by a preponderance of the evidence the existence of a severe impairment that
22 prevented performance of substantial gainful activity and that this impairment lasted for
23 at least twelve continuous months. 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c),
24

1 416.905(a), 416.912(a) and (c); *Yuckert, supra*, 482 U.S. at 146; *see also Tidwell v. Apfel*,
2 161 F.3d 599, 601 (9th Cir. 1998) (*citing Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir.
3 1995)). Any impairment that does not last continuously for twelve months does not
4 satisfy the requirement. 20 C.F.R. §§ 404.1505(a), 404.1512(a) and (c), 416.905(a),
5 416.912(a) and (c); *Roberts, supra*, 66 F.3d at 182.

6 Therefore, even if the ALJ did err by failing to fully credit an opinion about
7 limitations from Dr. Wheeler, any error would be harmless, as plaintiff did not
8 demonstrate that any mental impairment existed for a minimum of twelve months and Dr.
9 Wheeler herself opined that plaintiff's limitations would not last for any period of time.

10
11 **(2) Whether or not the ALJ properly evaluated plaintiff's testimony.**

12 Plaintiff contends that the ALJ erred by failing to credit fully plaintiff's allegations
13 and testimony. However, for the reasons stated below and based on the record as a whole,
14 the Court concludes that the ALJ's credibility determination is proper.

15 If the medical evidence in the record is not conclusive, sole responsibility for
16 resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample v.*
17 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (*citing Waters v. Gardner*, 452 F.2d 855,
18 858 n.7 (9th Cir. 1971) (*Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980)). An ALJ is
19 not "required to believe every allegation of disabling pain" or other non-exertional
20 impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (*citing* 42 U.S.C. §
21 423(d)(5)(A) (other citations and footnote omitted)).

22
23 If an ALJ rejects the testimony of a claimant once an underlying impairment has
24 been established, the ALJ must support the rejection "by offering specific, clear and

1 convincing reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)
2 (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also Reddick v. Chater*,
3 157 F.3d 715, 722 (9th Cir. 1998) (citing *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47
4 (9th Cir. 1991) (*en banc*)). The Court notes that this “clear and convincing” standard
5 recently was reaffirmed by the Ninth Circuit. *See Garrison v. Colvin*, 759 F.3d 995, 1015
6 n.18 (9th Cir. July 14, 2014) (“The government’s suggestion that we should apply a
7 lesser standard than ‘clear and convincing’ lacks any support in precedent and must be
8 rejected”). As with all of the findings by the ALJ, the specific, clear and convincing
9 reasons also must be supported by substantial evidence in the record as a whole. 42
10 U.S.C. § 405(g); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005)
11 (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

13 Plaintiff indicated in November, 2011 that as part of his daily activities, he brings
14 firewood in to the house (*see* AR. 190), but at his hearing, he testified that he does not lift
15 even a hunk of wood to add it to the fire (*see* AR. 53). The Court concludes that the ALJ
16 properly relied on this inconsistent testimony when failing to credit fully plaintiff’s
17 allegations and testimony about his disabling limitations (*see* AR. 29). *See Turner v.*
18 *Comm’r of Soc. Sec.*, 613 F.3d 1217, 1225 (9th Cir. 2010) (Ninth Circuit affirmed, noting
19 that because of a “discrepancy in [the claimant’s] testimony, the ALJ found that [the
20 claimant] could not be ‘found to be wholly credible regarding any allegation of total
21 disability’”).

22
23 The ALJ also relied on a finding that plaintiff’s allegations of disabling limitations
24 were not supported by the objective medical evidence (*see* AR. 26).

1 Although once a claimant produces medical evidence of an underlying
2 impairment, the ALJ may not discredit then a claimant's testimony as to the severity of
3 symptoms based solely on a lack of objective medical evidence to corroborate fully the
4 alleged severity of pain, here, the ALJ offered other reasons, such as the inconsistent
5 statements about plaintiff's ability to lift and carry firewood into the house, *see supra* ,
6 his statements in the record about his abilities and his activities of daily living (*see* AR.
7 28-29). *See Bunnell, supra*, 947 F.2d at 343, 346-47 (*citing Cotton, supra*, 799 F.2d at
8 1407).

9
10 As noted by the ALJ, Dr. Mohammad A. Saeed, M.D. performed a physical exam
11 of plaintiff and also "performed and electrodiagnostic evaluation of the claimant in
12 October 2011 [and] concluded the claimant had only a mild abnormal study" (*see*
13 AR. 27 (*citing* AR. 302)). The ALJ's finding is supported by substantial evidence, as Dr.
14 Saeed performed an exam and an electrodiagnostic study on October 27, 2011, and
15 concluded, among other things, that "[this] is a mildly abnormal study" (*see* AR. 302).
16 This set of findings by the ALJ also supports the ALJ's finding that plaintiff's allegations
17 of disabling limitations were not supported by the objective medical evidence.

18 Similarly, the ALJ noted a physical therapy visit in February, 2012 at which
19 plaintiff reported that his pain was relieved by steroidal injections (AR. 27 (*citing* AR.
20 313)). The ALJ also included the following regarding the evaluation with physical
21 therapist Mr. Brian Reiton, PAC:
22

23 A physical examination showed he had full strength in his lower
24 extremities. His straight leg raise tests were normal on the right side and
the left. The claimant requested to initiate chronic pain management for

1 his alleged back pain. Mr. Reiton suggested the claimant stretch and
2 perform strengthening exercises to eliminate his back pain.

3 (*Id.* (*citing* AR. 315)).

4 The ALJ's discussion regarding this February, 2012 evaluation is supported by
5 substantial evidence in the record. Plaintiff's lower extremity strength was normal, and
6 the straight leg raise tests were normal on the right and left side (*see* AR. 315). This
7 treatment note also supports the finding by the ALJ that plaintiff was prescribed only
8 ibuprofen for his pain (*see id.*). Based on the record as a whole, the Court concludes that
9 this set of findings by the ALJ also supports the ALJ's finding that plaintiff's allegations
10 of disabling limitations were not supported by the objective medical evidence.

11 The ALJ also noted examination results from Dr. Lang in March, 2012, such as
12 plaintiff's strong grips in both hands; that his opposition, finger extension and abduction
13 were strong bilaterally; that plaintiff "walked with a normal gait and was able to heel and
14 toe walk [and] [his] straight leg raises were negative on the right and positive on the left;
15 [h]owever he had good strength in both of his legs" (*see* AR. 28 (*citing* AR. 443)). Again,
16 the ALJ's findings are supported by substantial evidence in the record and support his
17 finding that plaintiff's allegations of disabling limitations are not supported by the
18 objective medical evidence.
19

20 The ALJ also noted various indications from plaintiff such as plaintiff's report that
21 "he can touch all his thumbs to his fingers; [he] can open a jar of peanut butter; [he] can
22 open a can of beer; [he] prepares meals for himself; [he] feeds his chickens and horses;
23 [he] regularly performs household chores and washes the dishes; [he] pulls weeds out of
24

1 his garden; [and] [although] the claimant frequently complained of hand numbness, he
2 had good grip strength and range of motion in his upper extremities” (AR. 28-29 (internal
3 citations omitted)). The ALJ also noted as follows:

4 [Plaintiff] also has no difficulties performing his activities of daily living
5 due to his back pain. He manages his own personal care. He cleans, he
6 does laundry, he makes minor house repairs and gardens. In his Function
7 Report, he indicated he is capable of lifting 15 to 20 pounds. The
8 limitations in the residual functional capacity are also supported by the
9 objective findings in his file. He routinely had full strength in his lower
extremities. He demonstrated good range of motion and had mostly
negative straight leg raises. He consistently walked with a normal gait.
Furthermore, even his treating physician indicated he could return to
work if he had a valid license.

10 (AR. 29 (internal citations omitted)).

11 For the reasons stated, the Court concludes that the ALJ’s finding regarding lack
12 of support from the objective medical evidence was supported by substantial evidence in
13 the record as a whole and that the ALJ did not err when evaluating credibility of plaintiff.
14 The ALJ offered specific, clear and convincing reasons, supported by substantial
15 evidence in the record, for the ALJ’s credibility determination.
16

17 **(3) Whether or not the ALJ properly assessed plaintiff’s residual**
18 **functional capacity and whether or not the ALJ erred by basing his**
19 **step five finding on a residual functional capacity assessment that did**
20 **not include all of plaintiff’s limitations.**

21 These arguments by plaintiff depend on the other arguments that already have
22 been discussed by the Court and found not persuasive, *see supra*, sections 1 and 2. The
23 Court finds no error.

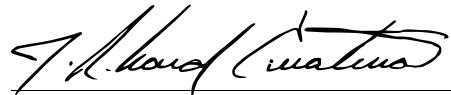
24 //

CONCLUSION

Based on the stated reasons and the relevant record, the Court **ORDERS** that this matter be **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

JUDGMENT should be for defendant and the case should be closed.

Dated this 29th day of December, 2014.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
United States Magistrate Judge